

No. 11342

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IN THE  
**United States Circuit Court**  
**of Appeals**  
**FOR THE NINTH CIRCUIT**

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POLSON LOGGING COMPANY,  
a corporation,  
*Appellant,*  
v.  
UNITED STATES OF AMERICA,  
*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT,  
OF WASHINGTON  
SOUTHERN DIVISION

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**Appellant's Reply Brief**

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I

**THE PROPOSED TAKING IS UNAUTHORIZED BY  
THE STATUTES RELIED ON**

Of the statutes given in the several Declarations of Taking as authority to acquire, the Government now wholly abandons the Act of June 4, 1897, 30 Stat. 34-36, and Acts supplementary thereto and amendatory thereof, 16 U.S.C.A. Sections 473-482, and 551, and the Act of September 5, 1940, 54 Stat. 867. It now relies solely upon:

1. The General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C.A. Section 257.

2. The Department of Agriculture Appropriation Act 1942, 55 Stat. 408.

3. The Federal Highway Act of November 9, 1921, 42 Stat. 218, 23 U.S.C.A. Secs. 1-25 as amended by the Act of July 13, 1943, 57 Stat. 560, and

4. The Department of Agriculture Appropriation Act 1944, 57 Stat. 392. See Government's brief, page 2.

### **First and Second Declarations of Taking**

Only the first two of the Acts now relied on were cited in the First and Second Declarations of Taking. The validity or effectiveness of those Declarations therefore depends on those two Acts alone. The General Condemnation Act grants no authority to acquire but merely authorizes condemnation where such authority had been otherwise and independently granted. See Appellant's Opening Brief p. 50, Government's brief p. 12.

The Department of Agriculture Appropriation Act 1942 grants no authority to acquire for the reasons pointed out in Appellant's Opening Brief pp. 55-62. The Government concedes that the appropriations made in the section of that act dealing with "FOREST ROADS AND TRAILS" which



were specifically "for carrying out the provisions of Sections 23 of the Federal Highway Act approved November 9, 1921 (23 U.S.C.A. 23)" grant no authority to acquire. Govt. Br. p. 23. The Government, however, argues that the appropriation in general language in the section of that act dealing with salaries and expenses of the forest service for "all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests constitutes a grant of the requisite authority." Govt. Br. p. 16. The *Threlkeld* case, 72 Fed. 2nd 464 does not support such argument nor warrant the conclusion drawn by the Government. The decision in that case was rested solely on the fact that the Appropriation Act there involved in terms made an appropriation for the "*construction and maintenance* of roads, trails, bridges," etc. The argument of the Court as to the "necessity" of the situation then before it was solely to support and sustain its conclusions that "the broad authority to *construct and maintain* roads and other improvements includes the power to acquire land for the purpose if it is necessary." (Cf. Appt. Op. Bf. p. 28.) Moreover, the "necessity" which the Court found present in the *Threlkeld* case did not exist in 1942-44 because "We (the Department of Agriculture) are building a fairly substantial mileage, not only to

open up new bodies of timber but also to reach areas where strategic minerals may be obtained. We are being supplied with money for that purpose from a special fund which was authorized for appropriation a year or two ago for the purpose of aiding the military effort. Of that fund about \$10,000,000.00 was allocated to timber and mineral access roads. To date we have been asked to supervise project work which will cost about \$2,800,000.00 to cover the construction, improvement or maintenance of about 1,200 miles of these access roads, of which about 45% is for timber and the balance for minerals." See testimony of C. M. Granger, Assistant Chief of the United States Forest Service at Hearing before the subcommittee of the committee on appropriations of the House of Representatives on the Agriculture appropriation bill for 1944 at page 594, set out in full in the Appendix to this brief.

Furthermore, since, in the enumeration of the purposes of the appropriation made by the 1942 Appropriation Act for salaries and expenses of the Forest Service, "the *maintenance* of roads and trails" is specifically set out, the subsequent specification of "all expenses necessary for the use, maintenance, improvement, protection and general administration of the national forest" is as clearly

for entirely different and non-overlapping purposes as though the latter clause had read, for "all *other* expenses," etc. (See Appendix, Appt. Op. Bf. pp. 110-112.)

The Government seeks to avoid the change in construction indubitably resulting from the change in the language of the Department of Agriculture Appropriation Acts following the decision in the *Threlkeld* case by reports of the Secretary of Agriculture as to road construction. Significantly, however, no instance is reported of the acquisition, whether by purchase, condemnation or otherwise of any right-of-way. And no decision is cited, and we believe none exists, which construes any Department of Agriculture Appropriation Act since 1934 as a grant of authority to the Secretary of Agriculture to acquire rights-of-way.

The Government's argument is inclusive and wholly insufficient to overcome the presumption arising from the change in the statutory language. The reports quoted in the appendix to the Government's brief are undoubtedly the reports required by Sec. 19 of the Federal Highway Act of November 9, 1921. 23 U.S.C.A. Sec. 20. The highways, roads and trails which in said reports were stated as having been constructed or improved were either on rights-of-way provided by states or municipali-

ties, or were on public lands over which no right-of-way had to be acquired other than the appropriation of the particular land needed from "the department supervising the administration of such land or reservation" in the manner prescribed by Sec. 17 of said Highway Act. 23 U.S.C.A. Sec. 18.

### Third Declaration of Taking

The third declaration of taking cites the four Acts now relied on as authority for the proposed Taking. It is conceded that the General Condemnation Acts is no such authority. The Department of Agriculture Appropriation Act of 1942 grants no such authority for the reasons already given and for the following further reasons:

1. It made appropriations for "the fiscal year ending June 30, 1942." With the expiration of that year the appropriations lapsed, the Act itself became *functus officio* and any authority that might have been implied from the appropriations made therein died with the appropriations themselves. The Third Declaration of Taking was dated November 2, 1943, and filed in the District Court Nov. 12, 1943 (R. 82-85).

2. The Department of Agriculture Act 1942 was held by the District Court to grant no authority to acquire, and that ruling was embodied in its

Order of Nov. 12, 1943. (R. 75.) The Government acquiesced in that ruling and after that order was made filed a new and third Declaration of Taking which was expressly stated to be "in lieu of" the second Declaration of Taking. (R. 81). By such action the Court's ruling that the Appropriation Act of 1942 granted no authority to acquire, became the law of the case and the Government became and is bound thereby. 3 Enc. of Fed. Procedure (2nd Ed.) Sec. 689 p. 313, citing in note 93 at page 317 the decision of this Court in *Presidio Mining Co. vs. Overton*, 261 Fed. 933, affirmed. 270 Fed. 388 and Certiorari denied 256 U. S. 694, 65 L. Ed. 1175.

The sufficiency of the third Declaration of Taking depends therefore on the question, whether the Congressional Acts therein cited for the first time grant the requested authority to acquire. The Department of Agriculture Appropriation Act of 1944 by itself differs in no material respect from the Department Appropriation Act of 1942. That it wholly fails to grant the requested authority is fully demonstrated by what has heretofore been said in respect of the earlier Appropriation Act.

The Departmental Appropriation Act of 1944, read in conjunction with the Federal Highway Act of 1921, as that latter Act stood when the Appro-

priation Act was passed and approved, is concededly no grant of authority to acquire, because by express terms an appropriation for "construction" was not an appropriation for "costs of right-of-way." Govt. Bf. p. 23.

Thus the question is resolved down to whether an appropriation for particular purposes specified in a particular section of another statute is enlarged and extended to other purposes by the subsequent amendment of the statute referred to.

Such was not the intention of the Department of Agriculture in seeking or of the Congress in making the appropriation of \$3,778,723.00 for FOREST ROADS AND TRAILS contained in the 1944 Appropriation Act. In justifying the appropriation requested and made, C. M. Granger, Assistant Chief of the National Forest Service, testifying before the Sub-committee of the House Committee on Appropriations, said:

"There is no appropriation recommended this year for the forest highway work, which embraces the type of road which is a part of the general transportation system of the county or of the State \* \* \* .

"The amount recommended for appropriation on the forest development work is entirely for maintenance. We will undertake no construction \* \* \* .

“The requested appropriation for the Forest Service is to enable us to maintain existing roads and trails \* \* \*. No construction, Mr. Chairman, it is all maintenance.”

Despite the assertion to the contrary in the Government’s Brief, page 25, we see no absurdity in concluding that Congress did not intend the appropriation to be for purposes not contemplated, and that it does not imply a grant of authority which was not requested.

That the Appropriation Act of 1944 and the Act of July 13, 1943 are *in pari materia* is denied. They can hardly be said to relate to the same person or thing, and certainly they do not have the same purpose or object. But even if they are, the later act may not be resorted to to determine the Congressional intent in enacting the appropriation act because that act is clear and unambiguous.

*Greenport Basin and Construction Company vs. United States*, 260 U. S. 512, 67 Law Ed. 270;

2 *Sutherland Statutory Construction*, 3rd Edition, Section 5201, Note 1, and cases there cited.

On the contrary, the Appropriation Act of 1944 is a statute of specific reference because it “refers

specifically to a particular statute by its title or section number." 2 Sutherland Statutory Construction, 3rd Edition, Section 5207.

The cases cited in the Government's brief on pages 24-25 are inapposite in that they all involve a resort to independent statutes to resolve ambiguities or uncertainties in the particular act being construed. There is no such ambiguity or uncertainty in the language of the 1944 Appropriation Act.

The Government's contention that the amendment of the Federal Highway Act by the Act of July 13, 1943 "related back so as to validate the earlier taking of possession" (Government's Brief, page 25) is without foundation. The cases cited in support thereof deal with Acts of Congress authorizing suits against the United States for previous tortious acts of officers of the United States for which there was at the date of such acts no remedy. See *Crozier vs. Krupp*, 224 U. S. 290, at page 305, 56 Law Ed. 771 at page 776. *Shoshone Tribe vs. United States*, 299 U. S. 476, 81 Law Ed. 360.

### **Taking of Gravel Lands Was Unauthorized**

The Government cites *Cameron Development Co. vs. United States*, 145 Fed. (2) 209, and *United States vs. Rayno*, 136 Fed. (2) 376 (Gov-



ernment's Brief, page 28) as sustaining the taking of the so-called gravel lands, Tracts 2 and 3, and as its only answer to appellant's contention that such taking was in any event wholly unauthorized. In neither of those cases was the authority to take in question. Both were concerned, the first wholly and the second primarily, with the question whether the fact that the government made use of materials which were found in lands that it had lawfully taken, but which were valueless at the time of the taking, was an element to be considered in determining just compensation.

## II

### **ERRORS IN THE SUBMISSION OF THE COMPENSATION ISSUE**

The argument advanced on behalf of the government is, as it seems to us, quite obviously a studied attempt to evade the issues raised and points made by appellant. The government does not in any way dispute that the roads taken or attempted to be taken were beyond question adaptable and available for the removal of more than a billion feet of the timber in the Olympic National Forest, that it was not merely reasonably probable that such timber would move out over these roads but physical and practical considerations made such

removal almost inevitable, and that a prospective purchaser would pay an increased price for the roads because of those facts which would be taken into consideration in the negotiation of a price between informed buyers and sellers. The government merely asserts that appellant is seeking to capitalize on the needs of the government. It brushes aside appellant's disclaimer of any attempt to recover what may be the peculiar value to the government of the property, disregards wholly the testimony, the rejection of which is complained of by appellant and in the face of admitted facts, asserts that this case is not what it precisely is, namely, one where the value of appellant's property has been enhanced because it adjoins the National Forest.

Appellant's position is fully sustained by the rule announced by the Supreme Court of the United States in *United States vs. Miller*, 317 U. S. 369, 377, 87 Law Ed. 337, 344, as follows:

“The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement.”

Appellant's lands were not probably within the scope of the Olympic National Forest, if for no other reason, because Congress, by its Acts of March 4, 1907 and June 25, 1910, 16 U.S.C.A. 471 (a), prohibited any addition to that forest except as and to the extent expressly authorized by it. They were merely adjacent lands and their taking for the use and benefit of the forest, that is, the enlargement of the forest project to include them, ought not to deprive appellant of the value added to those lands by the proximity of the forest.

Appellant's proffered evidence was not based on speculation, but was within the rule of *Olson vs. United States*, 292 U. S. 246, 78 Law Ed. 1236, directed to elements affecting value that depended on events which not merely were fairly shown to be reasonably probable, but which in part had occurred and in further part, were practically inevitable. Thus, the roads in question were adaptable to the removal of Olympic Forest timber, had been used for hire for that purpose, were sought to be acquired by the government for that purpose, and a billion or more feet of National Forest timber will "necessarily move out over them."

Appellant was not merely barred from proving value based on elements which would enhance the price negotiated by informed buyers and sellers,

but was barred from proving not merely the reasonable probability, but the well nigh inevitableness of the events on which such elements depend.

The government's suggestion that persons beneficially interested in timber lands may condemn lands of others for a logging road (Government's Brief, page 35), if it proves anything, proves appellant's point. Such a condemnation proceeding would be instituted only if the tolls charged by appellant for the use of its roads were unreasonable and the estimated outlay therefor was believed to be greater than the cost of acquiring a right-of-way for and constructing a new road. It is not reasonably probable that appellant, or any one owning the road here involved, would charge such excessive tolls as to force a prospective user thereof into constructing another and competing road.

WHEREFORE, the case should be reversed and remanded with instructions as prayed in appellant's opening brief.

Respectfully submitted,

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# Appendix

## HEARINGS

BEFORE THE  
SUB-COMMITTEE OF THE  
COMMITTEE ON APPROPRIATIONS  
HOUSE OF REPRESENTATIVES

SEVENTY-EIGHTH CONGRESS

ON THE

AGRICULTURE DEPARTMENT  
APPROPRIATION BILL FOR 1944

(pp. 597-599)

### FOREST ROADS AND TRAILS

Mr. Tarver. Forest roads and trails. The table at the top of page 99 will be inserted into the record at this point.

#### Forest Roads and Trails

Appropriation Act, 1943_____	\$7,000,000
Proposed transfer in 1944 estimates to "Salaries and expenses, Bureau of Agricultural Economics, economic in- vestigations _____	34,665
	<hr/>

Total available, 1943-----	6,965,335
Budget estimate, 1944-----	3,778,723
Decrease (including decrease of \$12,862 travel funds returned to surplus) -----	3,186,612

Mr. Tarver. Mr. Granger, we will be glad to hear any justification that you have to offer on this item.

### Forest Road Development

Mr. Granger. Mr. Chairman, the amount recommended for the appropriation this year occurs entirely in the subdivision of the road work which has to do with what we call forest development roads and trails. These are relatively simple roads and trails whose primary purpose is to provide for the protection and the administration of the national forests and the utilization of their products.

There is no appropriation recommended this year for the forest highway work, which embraces the type of road which is a part of the general transportation system of the county or of the State. In the forest highway category construction work will be almost entirely suspended except for the completion of work under existing contracts.

It will be possible to take care of maintenance obligations and a considerable portion of hang-over construction jobs out of funds that are still available out of former appropriations.

The amount recommended for appropriation on the forest development work is entirely for maintenance. We will undertake no construction. This sum will barely provide for what you might call the common standard and quality of minimum maintenance to keep existing and needed roads in usable condition, and to prevent loss in the large construction investment. The roads are being used now more for essential needs than almost at any other time in the past because of the heavy movement of timber which is being brought out, and to intensified fire protection, so it is extremely important that we be able to keep the roads in operating condition.

### **Additional Road Mileage**

Mr. Tarver. In your production of a considerable additional amount of timber for lumber from the national forests have you found it necessary to build a considerable mileage of roads in order to get at the timber?

Mr. Granger. Yes, sir. We are building a fairly substantial mileage, not only to open up new bodies

of timber but to reach areas where strategic minerals may be obtained. We are being supplied with money for that purpose from a special fund which was authorized for appropriation a year or two ago for the purpose of aiding the military effort. Of that fund about \$10,000,000 was allocated to timber and mineral access roads. To date we have been asked to supervise project work which will cost about \$2,800,000 to cover the construction, improvement or maintenance of about 1,200 miles of these access roads, of which about 45 percent is for timber and the balance for minerals.

Mr. Tarver. Other funds will continue to be available for these purposes during the next fiscal year from the special fund to which you have made reference?

Mr. Granger. Yes, sir. I understand some of that fund is still unallocated.

Mr. Norcross. The money the Forest Service is expending comes from an appropriation for the Public Roads Administration. On these low-standard roads the Forest Service is supervising and doing work requested of it by P. R. A. I don't know how much its appropriation is.

Mr. Tarver. The amount of the appropriation sought here in this item is not intended for the



purpose of constructing roads to reach timber supplies or strategic minerals?

Mr. Granger. That is right, Mr. Chairman.

Mr. Tarver. This was taken care of under the appropriations to which you referred?

Mr. Granger. Yes, sir. The requested appropriation for the Forest Service is to enable us to maintain existing roads and trails.

Mr. Tarver. It is for maintaining existing roads and perhaps for the construction of additional roads necessary in your fire-prevention work?

Mr. Granger. No construction, Mr. Chairman. It is all maintenance.

